

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

ROGELIO MORENO-GARCIA,
JASMINE RANGEL, FRANCISCO
MORENO-MAGANA, ANTONIA
GARCIA-MENDOZA, ISRAEL
MORENO-GARCIA, JUVENAL
MORENO-GARCIA, MARIO
GUTIERREZ, AMBER HAWK,
ALFONSO RANGEL, ANTHONY
MAGANA, JUAN DIEGO MORENO-
GARCIA, FRANCISCO MORENO-
GARCIA, and LUIS BARAJAS,

Plaintiffs,

v.

YAKIMA POLICE DEPARTMENT,
L.E.A.D. TASK FORCE OFFICERS
JOHN and JANE DOES 1-30,
CUSTOMS AND BORDER PATROL
OFFICERS JOHN and JANE DOES
1-30, YAKIMA SHERIFF'S
DEPARTMENT OFFICERS JOHN and
JANE DOES 1-30,

Defendants.

NO. CV-09-3123-EFS

**ORDER DENYING PLAINTIFFS'
MOTION FOR ENTRY OF DEFAULT
AND GRANTING DEFENDANTS'
MOTION TO DISMISS**

Before the Court, without oral argument, are Plaintiffs' Motion for Entry of Default (Ct. Rec. [4](#)) and Defendants' Motions to Dismiss (Ct.

1 Recs. [13](#) & [16](#)). For the reasons given below, the Court denies Plaintiffs'
 2 motion and grants Defendants' motions.

3 **I. Background**

4 On June 25, 2009, Plaintiff Jasmine Rangel filed a separate
 5 complaint in this Court in which she alleged that Defendants unlawfully
 6 seized personal property in connection with a drug forfeiture proceeding
 7 at four locations in Washington. Although Defendants had a warrant,
 8 Rangel alleged that they seized property not mentioned in the warrant,
 9 that she did not receive proper notice, and there is insufficient
 10 evidence to show that the articles seized were connected with drug
 11 trafficking. Ms. Rangel requested that the Court order Defendants to
 12 return the property.

13 On December 17, 2009, Defendants removed this case from Yakima
 14 County Superior Court. Plaintiffs, including Ms. Rangel, allege
 15 constitutional violations arising out of the seizure of the same personal
 16 property from three of the same locations.¹ In the facts section of the
 17 Complaint, they claim damages from injuries to their property that
 18 occurred when Defendants unlawfully broke doors to execute the warrants
 19 (Ct. Rec. 1 at 20).

20 Plaintiffs moved for entry of default on April 16, 2010 (Ct. Rec.
 21 4). They did not file an affidavit supporting their motion, however.
 22 After Plaintiffs filed their motion for entry of default, Defendants
 23 filed answers and the motions under consideration.

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25

26 ¹ The Complaint says that Defendants seized property from four
 locations, but lists only three.

II. Discussion

A. Motion for Entry of Default

Plaintiffs argue that they properly served Defendants, who failed to respond to their Complaint by the time specified under the Federal Rules of Civil Procedure. Because Defendants ultimately responded with motions to dismiss, and because of the questions about proper service of process raised below, the Court denies Plaintiffs' motion for entry of default as moot.² Additionally, the Court notes that the overriding policy of making decisions on their merits disfavors resolving cases by default. See *Eitel v. McCool*, 782 F.2d 1470, 1472 (9th Cir. 1986).

B. Motions to Dismiss

Defendants move to dismiss the Complaint on three grounds: this action is duplicative of the first case filed by Plaintiff Rangel; service was improper; and only Plaintiff Moreno-Garcia signed the Complaint in this case, so only he should remain as a Plaintiff if the suit is not dismissed in its entirety. Because the Court finds that service was improper, discussion of the other issues is omitted, and the Complaint is dismissed with leave to amend.

In order for the Court to exercise jurisdiction over a defendant, the defendant must be served properly. *Omni Capital Int'l, Ltd. v. Rudolf Wolff & Co., Ltd.*, 484 U.S. 97, 104 (1987). The plaintiff has the burden of showing that service of process was sufficient. *Wells v. City of Portland*, 102 F.R.D. 796, 799 (D. Or. 1984). To serve the United States, the plaintiff must deliver a copy of the summons and complaint to the

² Additionally, Plaintiffs failed to file the affidavit required for entry of default under Federal Rule of Civil Procedure 55.

1 United States Attorney for the district in which the action is brought
2 and to the Attorney General of the United States. Fed. R. Civ. P. 4(i).
3 To serve an agency of the United States, the plaintiff must serve both
4 the United States and the agency; to serve an individual, the plaintiff
5 must serve both the United States and the individual. *Id.* A plaintiff
6 serving a local government must either deliver a copy of the summons and
7 complaint to the government's chief executive officer or accomplish
8 service under the state's law. Fed. R. Civ. P. 4(j)(2). A plaintiff must
9 submit an affidavit asserting that service was accomplished, and must
10 effect service within 120 days after the complaint is filed. Fed. R. Civ.
11 P. 4(l), 4(m).

12 Plaintiffs' affidavit asserts that the Complaint and summons were
13 served on the Yakima Police Department, the LEAD Task Force, the Yakima
14 County Prosecuting Attorney's Office, Immigrations and Customs
15 Enforcement headquarters, and Customs and Border Patrol headquarters.
16 Although Plaintiffs claim that service was effected on the United States
17 Attorney's Office in this district and on the Attorney General, the
18 declaration of service belies that claim. Plaintiffs did not meet their
19 burden of showing adequate service on the federal Defendants.

20 The municipal defendants were not properly served either. The Yakima
21 Police Department is not a legal entity separate from the City of Yakima,
22 and it lacks capacity to be sued. *Stiffarm v. City of Pullman Police*
23 *Dep't*, No. CV-04-0414-EFS, 2007 WL 870343, at *5 (E.D. Wash. Mar. 20,
24 2007); see also *Van Vilkinburgh v. Wulick*, No. C07-5050FDB, 2008 WL
25 2242470, at *1 (W.D. Wash. May 29, 2008) (citing *United States v. Kama*,
394 F.3d 1236, 1240 (9th Cir. 2005) and *Dean v. Barber*, 951 F.2d 1210,
1214 (11th Cir. 1992)). Plaintiffs' claim lies with the City of Yakima

1 ("City"). They did not serve a complaint and summons on the City's chief
2 executive officer, or follow the procedures required under RCW
3 4.28.080(2) for service of process on cities. Therefore, service on the
4 City was improper as well.

5 Plaintiffs' argument that Defendants consented to jurisdiction by
6 a general appearance does not stand. Although Defendants appeared and
7 filed answers, they raised the defense of improper service in those
8 answers. (Ct. Recs. 6, 7, & 9.) When a defendant disputes the sufficiency
9 of service of process in an answer and a post-answer motion to dismiss,
10 the defendant does not waive objection to defects in service. Fed. R.
11 Civ. P. 12(h)(1); *cf. Benny v. Pipes*, 799 F.2d 489, 492 (9th Cir. 1986)
12 ("A general appearance or responsive pleading by a defendant that fails
13 to dispute personal jurisdiction will waive any defect in service or
14 personal jurisdiction."). Defendants did not make a general appearance
15 without disputing sufficiency of service, so that defense was not waived.
16 Because Plaintiffs did not accomplish sufficient service of process, the
17 Complaint is dismissed without prejudice.

18 III. Conclusion

19 For the foregoing reasons, **IT IS HEREBY ORDERED:**

20 1. Defendants' Motions to Dismiss (Ct. Recs. 13 & 16) are **GRANTED**.

21 Plaintiffs' Complaint (Ct. Rec. 1) is **DISMISSED without prejudice**.

22 2. Plaintiffs' Motion for Entry of Default (Ct. Rec. 4) is **DENIED**.

23 3. Plaintiffs' Motions to Strike (Ct. Recs. 21 & 22) are **DENIED**.

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IT IS SO ORDERED. The District Court Executive is directed to enter this Order and distribute copies to Plaintiffs and counsel.

DATED this 9th day of July 2010.

S/ Edward F. Shea
EDWARD F. SHEA
United States District Judge

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